

**UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
REGION 19**

PREMIER HOLDING COMPANY, INC. )  
d/b/a PREMIER ELECTRIC )

Case No. 19-RC-089887

Employer, )

**PETITIONER'S BRIEF IN SUPPORT  
OF EXCEPTIONS**

And )

INTERNATIONAL BROTHERHOOD OF )  
ELECTRICAL WORKERS, LOCAL 73, )

Petitioner. )  
\_\_\_\_\_ )

**NATURE OF THE PROCEEDINGS**

A hearing on challenged ballots in the above-captioned case was held before Hearing Officer Jessica Dietz in Spokane, Washington on March 4, 2013. On April 3, 2013, the Hearing Officer issued a Report and Recommendations. By separate pleading submitted herewith, Petitioner International Brotherhood of Electrical Workers, Local 73 ("Local 73", "Union" or "Petitioner") has excepted to certain of the Hearing Officer's recommended findings. This is Petitioner's Brief in support of exceptions.

**STATEMENT OF THE CASE**

Premier Holding Company, Inc. d/b/a Premier Electric ("Premier" or "Employer") is a certified electrical contractor doing business in the states of Idaho and Washington.

(Tr. at 135)<sup>1</sup> Premier has been in existence since 2002. (Tr. at 135) Travis Smith is an Electrical Administrator and Premier's Owner/President. (R. at p. 2, ¶5; Tr. at 135) Smith works alongside Tony Beck is Premier's "Estimator, Project Manager and Office Manager." (R. at p. 2, ¶5; Tr. at 136)<sup>2</sup>

Smith and Beck work in a business office in Hayden, Idaho. (R. at p. 2, ¶5; E. 2) Premier has an ongoing residential project at the Fairchild Air Force base in Spokane, and a commercial project on a "Sports Authority" box store in Coer d'Alene, Idaho. (R. at p. 3-4) But these are by no means Premier's only projects. Using the week of January 9, 2012 for example, Premier was working approximately nine (9) jobs in two states employing eighteen (18) electricians. (Tr. at 148; E. 3)

According to Smith, and adopted by the Hearing Officer, he and Beck are Premier's only supervisors. (R. at 8; Tr. at 136) Todd Jost and William Paradee are described by Smith as "in the field electricians" and were described by the Hearing Officer as "lead men" or "foremen." (R. at 3; Tr. at 144) To the contrary, witnesses who actually work with Jost and Paradee describe them as their supervisors.

Premier became aware no later than the first week of October, 2012 that its electricians were contemplating union representation. (Tr. at 24)<sup>3</sup> On October 2, 2012, an "all employee" meeting was held among Premier's electricians. (Tr. at 25) Among

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<sup>1</sup>. Tr.\_\_\_\_ citations are to the official transcript of the hearing. Board exhibits are referenced as B.\_\_\_\_; Employer exhibits as E.\_\_\_\_ and Petitioner's exhibits as U.\_\_\_\_. Reference to the Report and Recommendation appear as R.\_\_\_\_

<sup>2</sup>. Initially, there were four challenged ballots before the Region. Prior to hearing, the parties stipulated that Beck is a Section 2(11) supervisor. (R. at p. 3) In her Report and Recommendation, the Hearing Officer recommends that the ballot of "late arriving" voter Eric Ward be counted. (R. at p. 8) Petitioner does not except to this finding. Accordingly, only the Section 2(11) status of Todd Jost and William Paradee is at issue.

<sup>3</sup>. The Hearing Officer's report effectively ignores the import of the Union's organizing drive, basing the fact finding on a description of events occurring not just after the organizing drive was discovered, but after the election. As described below, the Hearing Officer limits the inquiry of Jost's status on the Sport's Authority job which commenced just prior to the hearing and well after the election was conducted.

others, Beck, Jost, Paradee and Premier apprentice electrician Eric Ward attended. (Tr. at 38-39) During that meeting, Jost and Paradee made statements described as “threatening job loss”; “telling employees if they want to be represented by the union they should just leave the Company”; and “asking employees if they want to be represented by the union.” (Tr. 39-41)<sup>4</sup> In fact, Ward attempted to *keep* Jost and Paradee from making these comments. (Tr. 39-41) The Hearing Officer did not discredit this testimony. (R. at p. 8, ¶1, 2)

The Hearing Officer recommends a finding that neither Jost nor Paradee exhibit **any** of the primary indicia of supervisory status. The Hearing Officer does not make nor recommend findings with regard to the secondary indicia. As detailed below, the Hearing Officer’s Report and Recommendation: (1) applies the wrong legal analysis; (2) ignores testimony she portrays as not having been presented; and (3) is based on an incomplete (and doctored) picture of Jost and Paradee’s job responsibilities.

### **ARGUMENT**

#### **TODD JOST AND WILLIAM PARADEE ARE SECTION 2(11) SUPERVISORS AND THE HEARING OFFICERS REPORT AND RECOMMENDATION TO THE CONTRARY IS ERRONEOUS.**

##### **A. The Hearing Officer’s Report Reaches The Wrong Conclusion Applying The Wrong Law. The Report Fails To Apply The Line Of Board Cases Specific To Supervisory Status In The Construction Industry Broadly And Electrical Installation Specifically.**

##### ***1. The Primary Indicia Of “Assigning” And “Responsibility To Direct” Has A Precise Meaning In The Area Of Electrical Contracting.***

The Hearing Officer bases her analysis entirely on application of Section 2(11) analysis arising in the health care industry. She is correct that Board law differentiates

<sup>4</sup>. Ward testified that Paradee represented to the assembled electricians at the October 2 meeting that if the Premier were to unionize, Premier would go out of business. (Tr. at 87-88) Ward took this to demonstrate managerial knowledge of Premier’s finances. (*Id.*)

“primary” and “secondary” indicia of Section 2(11) status. She is, of course, also correct that the “primary” indicia are drawn directly from Section 2(11) of the Act, which reads:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of authority is not merely routine or clerical in nature but requires the use of independent judgment. (Emphasis added)

Although she does not say so, the Hearing Officer appears to recognize that the “primary” indicia are disjunctive. “The possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status, as long as the authority is carried out in the interest of the employer and requires the exercise of independent judgment.” *Progressive Transportation*, 340 NLRB 1044, 1045 (2003). The Hearing Officer does not appear to quarrel with the Board’s position on that matter.

The failure of the Hearing Officer’s report begins with the manner of her application of *Oakwood Healthcare*, 348 NLRB 686, 691 (2006). Specifically, the Hearing Officer misses the Board’s treatment of “responsible to direct” as “accountability for performance.” The Board used this example (348 NLRB at 691):

If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible...and carried out with independent judgment. (Emphasis added)

The Hearing Officer’s Report proceeds to only apply only health care industry cases. The flaw, of course, is that the structure of the work environment in health care looks nothing like the work environment in construction as it relates to the interaction between supervisors and workers.

There is a wealth of fact specific case law Petitioner offered in its Post-Hearing brief, but the Hearing Officer ignored. An example is *Essbar Equipment Co.*, 315 NLRB 561 at 461 (1994). There, putative supervisor Detweiler worked doing installation work in the field along with two less experienced employees. *Id.* With reference to the primary indicia of “responsibility to direct,” the Board observed that “if Detweiler is not their supervisor, *there would be no one to responsibly direct them in the field.*” *Id.* (emphasis added)

Responsibility for direction of work in the field is of particular concern in the electrical trade. State law precisely regulates the industry—including the ratio of unlicensed apprentices who may work under the supervision of licensed journeymen.<sup>5</sup> The Board was mindful of that in *Debber Electric*, 313 NLRB 1094, 1095-96 (1994). The facts of *Debber* parallel those in the instant case:

Joan Doebber was the owner, and Joe Doebber the manager of Debber Electric, “a small firm engaged as a subcontractor in performing (primarily) electrical and (secondarily)” HVAC. *Id.* at 1094 Debber Electric employed five electricians, including David Von Behren, whom the union asserted was a supervisor. *Id.* at 1095 The evidence showed (*Id.* at 1095-1096):

- Joan Doebber spent no amount of time in the field, and Joe a “scant amount”;
- The electricians were assigned on a day-to-day basis by Von Behren, although the “testimony does not exclude the possibility that Doebber first told Von Behren where the employees should report”;
- Von Behren spent no more than 40 percent of his time doing “actual work” with the tools;
- Von Behren handled all the interchange with project officials such as the building owner;

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<sup>5</sup>. See: e.g., RCW 19.28.161 (Certification- Apprentices and Trainees-Supervision)

- Von Behren was viewed by employees as “in charge of the job” and viewed by the workers on his crew as their supervisor.

Rejecting the argument that Von Behren was a Section 2(3) “lead man”, the Board said (313 NLRB 1095):

The evidence seems quite clear that Von Behren had, and exercised, the authority to both assign and to responsibly direct employees, independently and in the interest of the Respondent. The secondary (nonstatutory) indicia of authority to which the Board often refers, further cement the notion that Von Behren was something more than a lead man. (Emphasis added)(Citations Omitted)

*Accord: Atlanta Newspapers*, 306 NLRB 751, 756 (1992)(“men-in-charge” are supervisors based on their “point of the work” responsibility).

Logically, the larger the number of electricians employed in the field, the less believable it is that they are being supervised from an office miles away. Such were the facts of *Garney Morris, Inc.*, 313 NLRB 101, 114 (1993).

According to *Garney*, only its president and vice-president were statutory supervisors. *Id.* at 114. The Board observed that, if true, this would have left “between 40 and 80 mechanics, located at jobsites [in two states]” with “only 2 supervisors to oversee their activities in any controlling and meaningful way.” *Id.* at 114. The Board rejected this notion, finding the field mechanics running the employer’s big projects to be Section 2(11) supervisors. *Id.*<sup>6</sup>

The indicia of supervisory status are not measured by the way the employer operates once it camouflages its supervisors.<sup>7</sup> Rather, changes made are found to be indicative of the truth. An example is *Precision Concrete*, 337 NLRB 211, 220 (2001). There, the employer curtailed the responsibility of project foreman in an effort to dilute the unit. The Board explained (337 NLRB at 220):

<sup>6</sup>. *Contrast: Croft Metals, Inc.*, 348 NLRB 717, 718 (2006)(leads who routinely work throughout the day in production—with statutory supervisors constantly present—are Section 2(3) employees)

<sup>7</sup>. The Hearing Officer’s paramount error was to limit the factual inquiry concerning Jost’s supervisory status to his work on the Sport’s Authority job that began just days before the hearing. (R. at p. 4; Tr. 19-20, 227)

I find that Respondent has failed to rebut the presumption that its foremen continued to perform duties of and remained statutory supervisors. First, the failure to inform all employees of this alleged change means that so far as these employees were concerned, nothing had changed. Moreover, the alleged change itself was accompanied by a "wink and nod" so that Respondent could have it both ways. The foreman would continue to perform duties much as before, receiving the same pay and bonus, just as Respondent wanted it, while if the foremen made unlawful statements, Respondent could then be in the position of disavowing its foremen's supervisory status and avoiding responsibility. This scheme cannot be permitted to stand. (Emphasis added)

Stated simply, the Board is sensitive to being "tricked" into believing Section 2(11) supervisors are Section 2(3) employees based on changes made in response to an organizing drive—and the Hearing Officer recommends the Board fall for Premier's trick.

2. *The Secondary Indicia Are Considered To Provide Both Context And Support For The Factual Findings Relating To The Primary Indicia.*

The Hearing Officer failed to make findings with respect to undisputed facts concerning the presence of secondary indicia pertaining to both Jost and Paradee. The "secondary indicia" include higher pay. In *Debber Electric*, Von Behren's pay was 20% to 25% higher than the rank-and-file electricians. 313 NLRB at 1096. Likewise, in *Essbar Equipment Co.*, Detweiler's pay was \$5 per hour more than the electricians he worked with and, *inter alia*, drove a company vehicle and had a credit card. *Id.* at 461.

The perception of the employee as a supervisor, and an expressed allegiance with management are also relevant as secondary indicia. In *Aesthetic Designs, Inc.*, 339 NLRB 395 at 395 (2003), the Board found excluded status exists where an employee "lacks a community of interest with other unit employees because he enjoys special working conditions and his interests are aligned with management."

This is consistent with the historical exclusion of managerial employees from bargaining exhaustively detailed by the Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974). Quoting from the appellate court's decision with approval, the Court said (416 U.S. at 284):

Congress recognized there were other persons so much more clearly 'managerial' that it was inconceivable that the Board would treat them as employees. Surely Congress

could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be. (Emphasis added)

The Hearing Officer did not mis-apply this analysis; she just didn't apply it at all.

As we next see, the evidence demonstrates—contrary to the Hearing Officer's report—that both Todd Jost and William Paradee have both the primary and secondary indicia of supervisory status. Most telling, but for Jost and Paradee, the Premier electricians would be left wholly without field supervision.

B. The Hearing Officer Failed To Make Findings Concerning Undisputed Testimony Concerning The 2(11) Responsibilities Of Both Jost And Paradee And Would Leave Premier's Electricians Without Any Supervision In The Field.

*1. Todd Jost Is The Foreman And Field Supervisor For All Of Premier's Large Projects And Is Compensated At A Rate Equaled Only By Admitted Supervisor Beck.*

Todd Jost is a journeymen electrician and an eight year Premier employee. (Tr. at 206) Credible and compelling evidence regarding Jost's work responsibility was provided by Eric Ward who testified under *subpoena*. (Tr. at 60-61)

Ward is an apprentice electrician and has worked for Premier since August 2008. (Tr. at 18) Ward has worked with Jost on over a half dozen "big jobs" since 2009. (Tr. at 19)<sup>8</sup> Presently, Jost, Ward and five or six other electricians work on a "Sports Authority." (Tr. at 19-20; 227)

The Hearing Officer reports that "No evidence was presented regarding the percentage of time Mr. Jost spends performing the duties of a lead man or the percentage of time he spends working with the tools." (R. at p. 4, ¶3) While not

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<sup>8</sup>. Ward testified that Jost runs all of Premier's major jobs, with the exception of the Fairchild Air Force Base, which is run by Paradee. (Tr. at 23-24)



expressed as a mathematical percentage, Ward was clear about Jost's supervisory function on that job (Tr. at 20-21):<sup>9</sup>

Q Does Mr. Jost work with the tools on the job at Sports Authority?

A Occasionally. He -- his responsibility is not necessarily always having the tool bags on. So there's many times throughout the day where -- well, the standing joke is that he loses his tools a lot or they're eight-year old new tools.... That is with all due respect to Todd. He has a lot on his plate. He runs the job, he runs the crew. He has to manage our materials incoming and outgoing, what materials we need for the week, what materials we need for the month, what the scheduling on the job is. He doesn't have a lot of time to carry his tools with him and work with the rest of us. (Emphasis added)

Asked what "runs the crew" means to him, Ward responded (Tr. at 21):<sup>10</sup>

We show up in the mornings. Todd's always the first one there, for the most part, 90% of the time. He's always the first on the job. He'll come in, unlock the gang box, kind of pull the tools out. As the crew filters in, we'll get there, he'll tell us the important stuff, what takes priority on the job, what has to be done that day based on the scheduling of the job. He knows the schedule better than we do. We're all familiar with it, but he knows the details of it a lot more.

When we have our safety meetings, when the safety meeting is concluded, typically the foremen will meet together and they'll go over the scheduling with the general contractor, which in this case is Horizon Retail Contracting. So then he'll go over that with Greg, the super on the job. When it's pertinent or precedent and he'll tell us what the scheduling requires us to do for the day.

He'll check up on us throughout the day. If we need parts immediately, he'll run down to the parts house and get them for us. He makes sure the job is going smooth. (Emphasis added)

Conflicting, and incredible testimony was offered by Smith. Smith testified that he and Beck engage in no interactive process with "field electrician lead" Jost regarding work schedule. (Tr. at 150) Nor, according to Smith, does he confer with

<sup>9</sup>. Jost was sequestered from Ward's testimony. When called, Jost said he spends his days "bending pipe and pulling wire." (Tr. at 207) Jost was called by Premier without *subpoena*, met with Premier's lawyers prior to the Hearing, and signed a Declaration Premier's lawyers wrote for him. (Tr. at 222-224)

<sup>10</sup>. Ward later testified that Jost is both the first to arrive at the job and the last to leave, such that if other employees are riding with him, they have to wait. (Tr. at 79)

his "field electricians" regarding manpower needs. (Tr. at 198)

With regard to the "responsible direction" of work by Jost, Ward offered the following (Tr. at 22):<sup>11</sup>

Sometimes Todd has a little bit of a problem -- I mean this in the best way -- in not trusting his guys to get the job done enough. So at times, it feels like he's micromanaging you because he'll check up on you sometimes every 15-20 minutes. Sometimes it's every hour just to make sure and double-check that you're doing what you're supposed to be doing for the day, which is fine. That's Todd's duties and responsibilities. (Emphasis added)

Ward also told of a time Jost asked the crew to work overtime, and employee Hellum resisted (Tr. at 23):<sup>12</sup>

I've heard him before on jobsites when someone wanted to go home early freak out on the guy because he didn't think he had enough done in the day and told him to pack his s-h-i-t up and get the h-e-l-l off the jobsite. So it's not -- it's disciplinary action at the spur of the moment. It's whether -- I guess it's whether you do what he wants you or not. He doesn't get after me too much. I'm a fairly premier employee. (Emphasis added)

Ward's account was verified by former Premier apprentice electrician Shawn Lowry, who likewise testified under subpoena. (Tr. at 102; Tr. at 118) Jost did not deny the substance of the event. (Tr. at 217)

Overlooked by the Hearing Officer's Report, the Hellum overtime event is significant. First, at least on that occasion, Jost acted with the cloak of disciplinary authority. Second, under all versions of the event, Jost requested the crew to work overtime, and decided if Hellum could leave. Consider this exchange between Jost and Premier's lawyer (Tr. at 217):

<sup>11</sup>. Although debatable whether it would constitute discipline, Ward testified that Jost is a stickler for promptness, and Ward was "kicked out of the van" by Jost for being tardy. (Tr. at 23) But from Ward's perspective, there was no doubt that when Jost threatened discipline, he was capable of carrying it out. (Tr. at 29)

<sup>12</sup>. Jost also told Ward the he was personally responsible for being recalled to work following a layoff. (Tr. at 55)

Q BY MR. HINES: Did you ever force Mr. Hellum to go home on any particular occasion?

A That occasion would have been -- it was after his work day was done, so I just -- I asked if everyone could help about ten minutes or so, packing lights upstairs to the second floor. He said he had to go, and I just said, "Okay, fine, just leave."

Endeavoring to save the event from being disciplinary, Premier inadvertently proved the point that Jost is the authority regarding scheduling and release from duty.<sup>13</sup> Given the transaction, it is little wonder Lowry viewed Jost as his field supervisor. (Tr. at 102)

Notably, describes Jost's *present* responsibilities; even after Premier had the opportunity to camouflage his supervisory duties in response to the Union's organizing drive. The un-contradicted testimony is that Jost's supervisory duty has been tempered by Premier since October, 2012. No Premier witness contradicted this from Ward (Tr. at 24):

Q Is the work that you observe Mr. Jost doing on the Sports Authority job consistent with the role that you've experienced him playing on the other jobs you've worked with him on in the past?

A To a degree, yes, and to a degree, no. It used to be that if you wanted a day off, you'd tell your foreman. So I've told Todd, "Hey, I need tomorrow off," and that was it. You'd have the next day off. Or if you were going to be late and you call Todd and say, "Hey, I'm going to be late today." All right. Or if you need to get off early, "Hey, I need to be off early." All right. That was Todd's responsibility on every job I've ever worked with Todd on. Recently, since October, that has changed. As Travis has gotten more involved in the company, that has changed to where now things like that have to be directed towards Travis. It's never been that way before. (Emphasis added)

Prior to the Union organizing effort, Ward saw Smith "three or four times" during a year-long project, and supervisor Beck "very rarely" in the field. (Tr. at 26).

<sup>13</sup>. Smith was asked only what should have been done under "current process" under the circumstances. (Tr. at 159)

Premier's effort to juxtapose Jost with Ward and others was a mess. Smith says Jost is a "lead" and the Hearing Officer would have the Board agree.<sup>14</sup> But the Hearing Officer missed the point that Smith calls *virtually all* his electricians "leads." Ward provided this explanation of the difference under questioning by the Hearing Officer (Tr. at 97):

Q So if there's a foreman on the job, is there also a lead man on the job?

A On the bigger jobs, sometimes you'll -- like at Westview, Todd was the foreman on the job. He entrusted Shane and I with lead roles. That's why I was confused during questioning because he would tell us what needed to be done, and then we would go out to the field and kind of get everything organized in the field while he was in the trailer going over scheduling or whatever else had to be done. (Emphasis added)

The Hearing Officer's Report fails to take cognizance of the answer to the question she posed. Instead, she mistakenly reports that the terms "lead" and "foreman" are interchangeable in Premier's operation. (R. at p. 3, fn. 4)

There is also significant evidence of secondary indicia with respect to Jost. His wage (\$22 per hour) is second only to admitted supervisor Beck (\$29 per hour), and is 28% higher than purported "lead man" Yearsly. (E. Ex. 5) As of December 15, 2012, Jost had earned 10% more in gross income than Beck, and over twice as much as Yearsley.<sup>15</sup> While income isn't a primary statutory indicia of supervisory status, it is certainly a strong indication that Premier is tactically downplaying Jost's responsibility.

<sup>14</sup> . Smith's testimony in this regard was comical. Initially, he identified seven (7) of the sixteen (16) electricians on the January 9, 2012 schedule [excluding himself and Beck as supervisors] as "leads." (Tr. at 138; E. 3) On cross, he listed only Paradee and Yearsly, but added Hankins. (Tr. at 184) He then testified that he has three lead men and no supervisors on a seven (7) person job. (Tr. at 185-186)

<sup>15</sup> . This contrasts sharply with Smith's testimony that his incentive system is equal because "they are all equal" in reference to his electricians. (Tr. at 167)

*2. If It Wasn't For William Paradee, Premier Electric Would Have No Supervision For Its Ongoing Work At The Fairchild Air Force Base, And Paradee Performs A Significant Managerial Role On The Project.*

Premier performs the electrical work for a residential housing project at the Fairchild Air Force Base. It began in 2009 and it is expected to complete in 2014. (Tr. at 30) William Paradee has been employed by Premier for six years, and has been on the Fairchild job from the outset. (Tr. at 30, 229-230).<sup>16</sup> He is the only Premier electrician who has been. (Tr. at 143, 247)

Here too, the Hearing Officer reports that "No evidence was presented regarding the percentage of time Mr. Paradee spends performing the duties of a lead man and the percentage of time he spends working with the tools." (R. at p. 5, ¶2) The comparison, of course, is not "lead" to "non-lead" but "supervisor" to "non-supervisor."

Ward and Lowry provided testimony on point that the Hearing Officer ignored. Ward worked for Paradee on the Fairchild job for about two months. (Tr. at 94). He provided this description (Tr. at 31-32):<sup>17</sup>

Q So what do you understand Mr. Paradee's role to be on the Fairchild project?

A He absolutely runs the job. My first day out there, I was instructed to meet up with Will. He would take me around, get me my pass. So I actually rode into the job with Will. I went to the head gate. He walked me in, we talked to -- or he introduced me to the officer at the gate who gave me all my paperwork that I needed to fill out to get onto base. He drove me over to the Balfour Beatty office, which is the owners of housing because the housing has been privatized now. Then we went through, I got my picture taken with Balfour Beatty. They gave me their pass because you have to have your military pass and your other pass, your Balfour Beatty pass. Then Will drove me over to the military office to get my military license and then drove me around and showed me the base, said, "Hey, this is where you're going to start, this is who you're working with. You guys are

<sup>16</sup>. Paradee is an apprentice. Because it is a federal project, the journeymen to apprentice ratio requirements do not apply. (Tr. at 31)

<sup>17</sup>. The testimony was very confusing about work vehicles. However, the evidence demonstrates that Tony Beck, Travis Smith, Smith's wife, Todd Jost and William Paradee all hold individual gas cards for use in their company-provided vehicles. (E. 6)

going to be doing trim work for the day." Dropped me off there and he went off to the rest of the crew. (Emphasis added)

Paradee's role in assigning work was the same throughout Ward's time on that job (Tr. at 34-35);<sup>18</sup>

So he'd drop off two guys here, say, "All right, these are your homes today. You guys are roughing, here's your prints." Take the rest of us over to the other side of the base, say, "All right, you guys are trimming today. All your material's in the house...

Will, his name is on everything out there. So when you're out at Fairchild, it's that same healthy respect you'd have for any foreman. His name's on everything from baker lockout tags to ladder safety inspections. He coordinates -- when Avista comes out to the job, he coordinates with the foreman of Avista on which houses are getting shut down, when the grid's going to get shut down, when the grid's going to get turned back on. His name's on everything out there, so whatever he tells you, you do. (Emphasis added)

Former Premier apprentice electrician Shawn Lowry confirms this testimony. Lowry said that Paradee--and only Paradee--assigned work to the ten (10) to twelve (12) man crew on which Lowry worked. (Tr. at 104)<sup>19</sup> Paradee confirmed the testimony regarding his responsibility for work assignments and procuring materials.<sup>20</sup> His initials appear on all delivery orders. (U. 2; Tr. at 254). At the very end of the hearing, the following exchange occurred about Paradee's current work at Fairchild (Tr. at 260):

HEARING OFFICER DIETZ: Who is the other lead man right now?

THE WITNESS: Well, I have Michael Yearsley who is kind of on all of the trims at this point, where I have found myself roughing in a lot of the houses, wiring -- pulling actual wire in the houses.

Q BY MR. HINES: Did you ask Yearsley to do the trims?

A No, he wanted to.

Q Did he tell you that he wanted to?

A Yes.

<sup>18</sup> . Smith could not enter the base for a time due to "legal restrictions" leaving Paradee very much independent. (Tr. at 36)

<sup>19</sup> . Lowry contrasted Paradee's role with that of purported "lead" Hodan. Rather than supervising a crew, Hodan just showed Lowry what to do on a house the two and one other wired. (Tr. at 129)

<sup>20</sup> . Smith tried to downplay Paradee's role in ordering materials by testifying, incredibly, that any of his employees can order any amount of material, at any cost, without prior permission. (Tr. at 186)

The very fact Yearsley “told” Paradee he wanted to do trims demonstrates that Paradee makes and approves job assignments. The exchange makes no sense otherwise.

Further evidence was presented regarding Paradee’s unique role at Fairchild. He performs legally required tasks such as tag in/tag out which Lowry, for example, was not authorized to perform. (Tr. at 105-106)<sup>21</sup> Paradee disagrees with Lowry and Ward, testifying he is just one among several employees who are authorized to perform tag in/tag out—although he only named one and said they did it together. (Tr. at 244)<sup>22</sup>

With regard to the secondary indicia, Paradee holds himself out as a manager and having “insider” knowledge. Twice during his testimony, Paradee referred to Fairchild as “my project.” (Tr. at 244, 256) Although identifying Yearsley as a second lead on the project, Paradee slipped and said “I just had him” in response to a question regarding work assignment. (Tr. at 244) Perhaps most revealing, when asked about how often he picks up checks for Smith, Paradee responded it depends on “how bad we need the money.” (Tr. at 256)

And Paradee spoke like a manager at the October 2, 2012 “all employee” meeting, Paradee commented that should Premier unionize, the company would have to go out of business. (Tr. at 87-88) Coincidentally or not, Paradee received a wage increase after this meeting. (Tr. at 251-252) Apart from being an unfair labor practice, the comment had the practical effect of suggesting to other employees that he knows Premier’s finances at a level they do not. Paradee has no place in the putative

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<sup>21</sup>. The only other electrician identified as having authority to do the tag in/tag out was a journeymen. (Tr. at 128)

<sup>22</sup>. Paradee was called by Premier to testify without *subpoena*. He met with Premier’s lawyers prior to testifying, signed a Declaration they prepared for him, and was told to make sure his testimony was consistent with that Declaration. (Tr. at 245-246)

bargaining unit.

The Hearing Officer's Report accounts for none of this. Summarily, she writes that "Although not every bit of evidence of every argument is specifically address, I have nonetheless considered all matters." (R. p. 2 at fn. 3) It is impossible to tell if that is true. It is one thing to resolve credibility determinations based on conflicting evidence—as the Hearing Officer claims to have done. (*Id.*) It is quite another thing to ignore evidence presented by witnesses the Hearing Officer credits. She did exactly that, ignoring the testimony **everyone** contradictory or not.

In sum, the Hearing Officer's Report and Recommendation applies the wrong law, fails to properly apply the facts to that law, and disregards the only evidence presented on the questions she was charged with addressing. The Report, in that regard, could not have been worse.

### CONCLUSION

For the foregoing reasons, the Hearing Officer's Report and Recommendation should not be adopted with regard to the ballots of Todd Jost and William Paradee, and those ballots should be disqualified.

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